INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	11
Conclusion	21

CITATIONS

Cases:

American Fur Co. v. *United States*, 2 Pet. 358	
Anderson v. *United States*, 273 Fed. 20	
Butler v. *United States*, 53 F. 2d 800	12
Cooper v. *United States*, 9 F. 2d 216	12
Gendelman v. *United States*, 191 F. 2d 993, certiorari denied, 342 U.S. 909	15, 19
Graves v. *United States*, 191 F. 2d 579	19
Himmelfarb v. *United States*, 175 F. 2d 924, certiorari denied, 338 U.S. 860	16
Holt v. *United States*, 218 U.S. 245	13
Hurtado v. *California*, 110 U.S. 516	14
Murdick v. *United States*, 15 F. 2d 965, certiorari denied, *sub nom. Clarey* v. *United States*, 274 U.S. 752	12
Paschen v. *United States*, 70 F. 2d 491	12
Schuermann v. *United States*, 174 F. 2d 397, certiorari denied, 338 U.S. 831	20
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U.S. 574	13
United States v. *Augustine*, 189 F. 2d 587	19
United States v. *Chapman*, 168 F. 2d 997, certiorari denied, 335 U.S. 853	20
United States v. *Holmes*, 168 F. 2d 888	13
United States v. *Johnson*, 319 U.S. 503	12, 18, 19
United States v. *Potson*, 171 F. 2d 495	20
United States v. *Skidmore*, 123 F. 2d 604, certiorari denied, 315 U.S. 800	19
United States v. *Smyth*, 104 F. Supp. 283	12
United States v. *Thompson*, 251 U.S. 407	12

Statutes:

Internal Revenue Code:	
Section 145 (26 U.S.C., 1946 ed., 145)	3

Miscellaneous:

	Page
Federal Rules of Criminal Procedure:	
Rule 6(e)	13
IV Wigmore, *Evidence* (1940 Ed.), Sec. 1078	15
VII Wigmore, *Evidence* (1940 Ed.), Sec. 1923	19

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 259

THOMAS W. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Memorandum opinions of the District Court on petitioner's motion to dismiss the indictment (R. 22), on petitioner's motion for a bill of particulars (R. 40-43), and on petitioner's motion for a new trial (R. 631-634) are not reported. The opinion of the District Court on petitioner's motion to modify sentence is reported at 108 F. Supp. 14 (S.R. 32).[1] The opinion of the Court of Appeals (C.A. Proc. 4) is reported at 204 F. 2d 666.

[1] The record in this Court has not been successively paginated. The following abbreviations will be used to denote the various portions of the record: record filed in the Court of Appeals by the appellant-petitioner, "R."; supplement to the record filed in the Court of Appeals by the appellee-respondent, "S.R."; proceedings in the Court of Appeals, "C.A. Proc."

JURISDICTION

The judgment of the Court of Appeals was entered May 27, 1953 (C.A. Proc. 17), and an order denying petitioner's petition for rehearing was entered June 16, 1953 (C.A. Proc. 33). By order of Mr. Justice Clark, dated July 7, 1953, the time within which to file a petition for writ of certiorari was extended until August 14, 1953. The petition for a writ of certiorari was filed August 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Petitioner was indicted in three counts for wilfully and knowingly attempting to evade his income taxes for the years 1945, 1946, and 1947. The case was tried on a net worth theory. Petitioner introduced no evidence on his own behalf, and was found guilty on all three counts. The petition for a writ of certiorari, which does not attack the sufficiency of the evidence to support the conviction, presents the following questions:

1. Whether the trial court abused its discretion in denying a motion to dismiss the indictment, where the basis of the motion was the contention that sufficient competent evidence to support the return of the indictment could not have been presented to the grand jury during its deliberations.

2. Whether certain evidence, based upon admissions of the petitioner and his representatives, was properly admitted against him.

3. Whether the trial court abused its discretion in permitting the Government's expert witness to

summarize in written form both the underlying evidence and the calculations which showed the amounts of income taxes the petitioner had failed to pay prior to and during the prosecution years.

4. Whether the charge of the trial court adequately instructed the jury.

STATUTE INVOLVED

Internal Revenue Code:

Section 145. Penalties.

* * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on January 14, 1952, in the United States District Court for the District of

Minnesota, in three counts, charging him with wilfully and knowingly attempting to evade his income taxes for 1945, 1946, and 1947, in the amounts of $23,779.34, $7,385.36, and $10,862.10, respectively (R. 1-3). On February 18, 1952, petitioner filed a motion to dismiss the indictment, to require the taking of testimony from the members of the grand jury, and to require the production of the transcript of the proceedings before the grand jury. (R. 3-5). With this motion petitioner filed an affidavit, sworn to by one of his counsel, alleging, on information and belief, the following: the case against the petitioner was based on the "net worth" theory; petitioner had advised counsel that he had made no statement of any kind, either written or oral, concerning his income tax matters to any representative of the Bureau of Internal Revenue; the grand jury which returned the indictment started to hear testimony at 10:30 a.m.; at 11:45 a.m. it returned the indictment against the petitioner; there was only one witness to testify against the petitioner before the grand jury, the special agent of the Intelligence Unit of the Bureau of Internal Revenue. The affidavit further alleged that it was "a physical and mental impossibility to adequately and properly by competent and legal evidence to present to a grand jury" the necessary information to support the return of the indictment in that length of time. (R. 5-11.)

After the filing of memoranda by petitioner and the United States, District Judge Donovan entered an order deferring the motion for determination at

the trial by the presiding judge (R. 21). With that order Judge Donovan filed a memorandum, stating that he was:

> not persuaded to require production of a reporter's transcript of the proceedings before the Grand Jury. Removal of the veil of secrecy from what transpired in the presence of that body in my opinion is not warranted at this stage of the proceeding. Granting that the indictment must be based on competent evidence, I am not impressed that the time consumed in the presentation of evidence was too little. In the presentation of evidence before the jury, time is a relative matter.

On May 19, 1952, petitioner renewed his motion, which was then denied by the presiding judge (Judge Bell) (R. 58).

The case was tried on a net worth theory, whereby the Government showed, with appropriate qualifications, that the petitioner's net worth, *i.e.*, assets less liabilities, had increased during the taxable years far beyond the income he had reported on his tax returns. The starting point, a well-established fixed figure of petitioner's net worth at a date prior to the prosecution years, was an affidavit sworn to by petitioner in 1937 as to his financial condition. This affidavit showed that his net worth at that time was $18,578.58 (Ex. 33).

The Government's principal witness, insofar as the introduction of evidentiary materials was concerned, was the Bureau of Internal Revenue Agent who had conducted the investigation, George H.

McKusick (R. 188-200, 308-436).[2] The evidence introduced by the Government is summarized in Government Exhibits 224, 225, 226, and 227.[3] Petioner offered no evidence to rebut the Government's case. The Government's evidence showed that the petitioner had, among other holdings, liquor interests, investments in bars (R. 320-323), cafes, in a gambling "news service" (R. 427, 481), and in similar concerns. It further shows that the major source of his reported income was "wagering." (Ex. 9-11; S.R. 5-6). The record also shows obvious attempts by petitioner to avoid the tracing of his financial transactions (see, *e.g.*, R. 184, 192, 198, 217, 244-246, 253, 265, 266-267, 297, 322-328, 369, 412-413, 433-434).

To some degree, evidence was supplied or corroborated by petitioner's admissions, and petitioner objected at the trial to the admission of such testimony. One such admission was that regarding petitioner's living expenses. These amounts were obtained from agreements between petitioner and his representatives, Joseph A. O'Gordon and Leonard H. Weinstock, on the one hand, and the Government agents who had conducted the investi-

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[2] For the scope and comprehensiveness of this investigation, see R. 191, 327, 330-331, 341, 354, 425-426, 433.

[3] Exhibit 224 is a thorough summary of all the evidence in the case. Exhibit 226 shows the difference between the net income reported by the petitioner and the net income showed by the Government's evidence. It also includes the amount of taxes due, according to each such net income, and the differences between the taxes so calculated. Exhibits 225 and 227 are enlarged photographic reproductions of 224 and 226, respectively, and, by stipulation, were not certified to this Court.

gation, Messrs. McKusick and Kleven, on the other. In February, 1951, Agents McKusick and Kleven prepared an itemized schedule of the petitioner's living expenses as a result of their inquiries into such expenditures (R. 348, 352, 353). This schedule was then exhibited to Mr. O'Gordon, petitioner's attorney (R. 346-348), who also held an express power of attorney to represent him (Ex. 34). Those expenses were calculated as $9,000 for 1945, $15,000 for 1946, and $15,000 for 1947 (R. 349). Mr. O'Gordon showed the schedule to the petitioner and later reported to Mr. McKusick the next day that his client "will be happy to use the figures." (R. 348-350.) After further discussion, Mr. O'Gordon referred the agents to Mr. Weinstock, petitioner's accountant (R. 350). On April 24, 1951, Mr. McKusick showed this schedule to Mr. Weinstock (R. 351), who had filed a power of attorney with the agents (Ex. 35). The schedule was examined by Mr. Weinstock, and it was finally agreed that the proper figures for the prosecution years were $10,000 for 1945, $12,000 for 1946, and $12,000 for 1947 (R. 353). Petitioner objected at the trial to the admissibility of either the schedule agreed to by Mr. O'Gordon or that agreed to by Mr. Weinstock.

A similar question of admissibility arose as to Exhibits 70 and 71. In December, 1950, Mr. O'Gordon was given a series of questions (Ex. 70), concerning certain specific details of several of petitioner's financial transactions, to take to the petitioner, and, as O'Gordon testified, to "return his

answers." He further testified that the questions were "answered by us." (S.R. 1-2). These answers, identified by O'Gordon as Government Exhibit 71, were typed on Mr. O'Gordon's unsigned legal stationery, and were submitted to the agents on February 1, 1951 (see R. 432). In corroboration of the foregoing, Mr. McKusick testified that Exhibit 70 was given to Mr. O'Gordon for answers "by his client, Mr. Banks" (R. 332), and that the answers given him by Mr. O'Gordon for petitioner were contained in Exhibit 70 (R. 333). Petitioner objected to the admissibility of these exhibits and this testimony, chiefly on the grounds that Mr. O'Gordon had no authority to bind him by any admissions which might have been made in the answers to the questions. The objections to the testimony on living expenses and on Exhibits 70 and 71, as well as to the exhibits themselves, were overruled.

Through Bureau of Internal Revenue Agent Kleven, Exhibits 224, 225, 226, and 227 (see *supra*, p. 6, n. 3) were introduced. These exhibits contained a statistical summary of all the relevant evidence which had been adduced by testimony and documents. Agent Kleven's testimony gave in complete detail the source of each of the figures on these Exhibits, and comprehensively explained the application of the net worth theory to the evidence in the case (R. 453-527). The exhibits further showed that petitioner's net worth had increased from $18,578.58 in 1936 to $322,877.34 in 1947, and that petitioner had failed to report and pay taxes

for the prosecution years in the amounts of $15,044.06, $5,829.41, and $12,067.55, respectively. Petitioner's objections to the admissibility of these exhibits and to Agent Kleven's testimony—on the grounds that there was insufficient foundation therefor (R. 458, 463-464) and that it invaded the province of the jury (R. 460)—was overruled.

After the submission of the Government's case, petitioner moved for a judgment of acquittal, which was denied (R. 578). Petitioner then rested, submitting no evidence on his own behalf (R. 578). In closing argument to the jury, petitioner's counsel pointed out that petitioner had furnished the answers in Exhibit 71 "voluntarily to the government" and that petitioner "gave [the information] to them as best he could." (S.R. 18.)

Petitioner submitted fourteen requests for instructions (R. 579-583), and took exception to the refusal of the court to grant six of those requested (R. 624), as well as to certain other portions of the charge. That charge included, *inter alia*, the following paragraphs:

* * * * *

* * * The defendant cannot, therefore, be convicted of the offenses charged in this indictment unless and until each and every essential element of the crime has been established by evidence that satisfies you beyond a reasonable doubt. [R. 612.]

* * * * *

You are instructed to determine whether the individual tax liabilities for the years here in-

volved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence. [R. 618.]

* * * * *

Circumstantial evidence consists of facts proved from which the jury may infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely in the direction of guilt, and must clearly exclude every other reasonable hypothesis except that of guilt.

To warrant a conviction upon circumstantial evidence, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. It is not sufficient that the facts coincide and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis and must exclude the hypothesis of innocence. [R. 621.]

The jury returned a verdict of guilty on all three counts (R. 628). The motion for a new trial, raising, *inter alia*, the failure to dismiss the indictment, the reception of oral testimony and exhibits, and the failure to give certain instructions, was denied (R. 629-632). Petitioner was sentenced to a general sentence of three years and was required to pay a fine of $10,000 (R. 634). His motion to reduce

sentence was denied on September 26, 1952 (R. 643). On May 27, 1953, the Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of conviction (C.A. Proc. 4), and on June 16, 1953, denied the petition for rehearing (C.A. Proc. 33).

ARGUMENT

In this Court, petitioner does not challenge the sufficiency of the evidence to support his conviction. He relies solely upon several allegedly improper rulings of the trial court on matters of procedure and evidence. Each of these rulings was correct, and none of these contentions warrants review by this Court.

1. Petitioner contends (Pet. 12-18) that it was error to deny his motion to dismiss the indictment, to produce the transcript of the grand jury proceedings, and to call the grand jurors as witnesses as to what had transpired during their deliberations. The basis of the motion was the contention, supported by the affidavit of counsel, that it was allegedly impossible, within the time actually consumed, for one man to have presented to the grand jury sufficient competent evidence to warrant the return of the indictment. This argument, which is essentially factual in nature, and which both courts below rejected, is without merit.

Bureau of Internal Revenue Agent McKusick was the Government witness before the grand jury. Mr. McKusick had been in charge of the investigation which resulted in the indictment and had conducted the largest part personally. At the trial he was the Government's principal evidentiary wit-

ness. His testimony (R. 188-200, 308-436) occupies a major part of the record of the trial proceedings, and his competency to testify before the grand jury as to petitioner's financial transactions cannot be disputed. See *Murdick* v. *United States*, 15 F. 2d 965 (C.A. 8), certiorari denied, *sub nom. Clarey* v. *United States*, 274 U.S. 752.

Petitioner, however, suggests (Pet. 14) that because other witnesses testified at the trial and because documentary evidence was there introduced, there must have been an impropriety in the grand jury proceedings. But that fact of itself does not render incompetent Mr. McKusick's testimony. For an examination of his testimony at the trial shows his intimate familiarity with practically every one of the petitioner's financial transactions. During the investigation he and the agents operating under his direction had presumably studied all of the basic documents necessary for the final net worth calculation. It is clear that Mr. McKusick could have testified from first-hand knowledge as to substantially all the probative evidence in the case.[4] And, insofar as the length of time spent be-

[4] Even if the standard of the admissibility of evidence before a grand jury is deemed the same as that before a petit jury (but cf. *United States* v. *Thompson*, 251 U.S. 407, 413; *United States* v. *Smyth*, 104 F. Supp. 283, 296-300 (N.D. Cal.); see also, *United States* v. *Johnson*, 319 U.S. 503, 510), Mr. McKusick could have summarized the documents he had examined before the grand jury. For the courts have consistently held that in a trial an expert accountant may summarize on direct examination—where voluminous and complex books and records are involved—the totals and import of the underlying data. *Paschen* v. *United States*, 70 F. 2d 491, 501 (C.A. 7); *Butler* v. *United States*, 53 F. 2d 800, 805 (C.A. 10); *Cooper* v. *United States*, 9 F. 2d 216, 222-223 (C.A. 8).

fore the grand jury is concerned, the court below pointed out (C.A. Proc. 10): "Reviewing [Mr. McKusick's] evidence indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand jury or a petit jury in case no time was consumed by counsel's objections and arguments to the court on admissibility."

In sum, the motion to dismiss the indictment raised only a question of discretion in the trial court.[5] *United States* v. *Holmes*, 168 F. 2d 888 (C.A. 3). As to this discretion petitioner raises, in essence, only a factual question—whether it was possible within the period of the grand jury's deliberations to have had presented to it sufficient evidence to support the return of the indictment.[6]

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[5] Under Rule 6(e) of the Federal Rules of Criminal Procedure, the unveiling of the secrecy of the grand jury deliberations is incontrovertibly within the discretion of the trial court. Here, the purpose of the unveiling was accomplished by the assumption of both courts below that the allegations of the affidavit were true.

[6] In at least one important respect, however, the affiant appears to have been misinformed. Thus, although he stated on information and belief that the petitioner had "not made any statement of any kind, either written or oral, concerning his income tax matters to any representative of the Bureau of Internal Revenue" (R. 7), the record shows that such statements were made. See *infra*, pp. 14-18.

It would also seem that the allegations of the affidavit in support of the motion were insufficient to warrant the dismissal of the indictment or the production of the grand jurors and transcript of their proceedings. For the affidavit merely alleged that "all the foregoing evidence cannot be presented by one man in less than one hour without the use of *a substantial amount* of incompetent evidence if not all incompete[n]t evidence" (Emphasis supplied) (R. 10). The fact that some of the evidence before the grand jury might have been incompetent would be insufficient to warrant the dismissal of the indictment (*Holt* v. *United States*, 218 U.S. 245, 247-248; *Shushan*

Five judges have carefully considered and rejected his contention that the time was insufficient (R. 22, 58, 629-632; C.A. Proc. 10). There is no need for this Court to undertake another independent analysis of the record.[7]

2. Petitioner contends (Pet. 18-19) that the courts below erroneously bound him by the admissions made by his representatives. But as to each of these admissions, the ruling of the trial court was unexceptionable, and raises no question warranting consideration here.

a. Joseph A. O'Gordon was petitioner's attorney (R. 200-201). He also possessed an express power of attorney, by which he was empowered to act for the petitioner with the Bureau of Internal Revenue in matters relating to his taxes (Ex. 34). In December, 1950, Mr. O'Gordon was given a series of questions (Ex. 70) to take to the petitioner, and to "return his answers." The questions were, as he testified, "answered by us." (S.R. 1-2). The answers, typed on Mr. O'Gordon's legal stationery (Ex. 71), were submitted to the agents on February 1, 1951 (see R. 432). Mr. McKusick, in turn, testified that Exhibit 70 was given to Mr. O'Gordon for answers "by his client, Mr. Banks"

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v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574; *Anderson* v. *United States*, 273 Fed. 20, 29 (C.A. 8)), and the motion to dismiss was therefore properly denied, even on counsel's assumption.

[7] Nor, of course, is there any need, as suggested by petitioner (Pet. 17 n. 5), for this Court to reconsider on this record, *Hurtado* v. *California*, 110 U.S. 516, which was concerned with the scope of the Fourteenth Amendment.

(R. 332), and that the answers given by Mr. O'Gordon for Mr. Banks were contained in Exhibit 70 (R. 333).

This evidence establishes that petitioner supplied the answers to Mr. O'Gordon to return to the agents, and as such, there is no question of their admissibility. Cf. *Gendelman* v. *United States*, 191 F. 2d 993 (C.A. 9), certiorari denied, 342 U.S. 909. Indeed, on summation, petitioner's counsel argued to the jury that petitioner had voluntarily furnished the information to the agents and that he gave the agents the information "as best he could." (S.R. 18).

Further, it is clear that supplying answers to questions concerning petitioner's tax liability was within the scope of the attorney's authority, from his status as attorney, from the express provisions of the power of attorney, and from the testimony in the record. As so authorized, his admissions were, of course, binding upon petitioner in the subsequent criminal proceeding. *American Fur Co.* v. *United States*, 2 Pet. 358; IV Wigmore, *Evidence* (1940 ed.), §1078. The very purpose of the designation of O'Gordon to represent petitioner was to give the Government someone with whom it could deal and upon whom it could rely. To permit petitioner to designate an attorney as his representative and then to pick and choose among those statements made by the attorney on his behalf by which he would be bound would be wholly inconsistent with the responsibilities and reliability of an attorney or other authorized representative.

Cf. Himmelfarb v. *United States*, 175 F. 2d 924, 939 (C.A. 9), certiorari denied, 338 U.S. 860.

b. During the three prosecution years, when petitioner's net worth averaged about $300,000, living expenses were ascribed to him of $10,000, $12,000 and $12,000 respectively, clearly reasonable and non-prejudicial amounts.[8] Petitioner apparently contends, however (Pet. 18-20), that no amounts should have been used for his living expenses for that period. But it is clear that the district court committed no error by admitting the testimony as to petitioner's living expenses.

O'Gordon, petitioner's attorney, took a schedule of living expenses which had been prepared by the investigators to the petitioner, and reported back that petitioner "will be happy to use the figures." (R. 348-350). These figures were $9,000, $15,000 and $15,000, respectively. Subsequently, O'Gordon referred the agents to Leonard H. Weinstock to work out a new schedule (R. 350). According to the testimony of Mr. McKusick, he and Weinstock reached an agreement as to reasonable figures for petitioner's living expenses for the taxable years, of $10,000, $12,000 and $12,000 respectively (R. 353).[9] Weinstock was the accountant who had pre-

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[8] In a net worth computation, amounts of money used as living expenses are added to the increase in net worth—as represented by changes in assets and liabilities—over the taxable year, inasmuch as such amounts must represent income which has been earned, but which has not been consumed by the acquisition of assets.

[9] On the stand at the trial, Weinstock purported to forget the testimony he had given three weeks before at a grand jury hearing to the effect that he had submitted the second schedule

pared the tax returns for petitioner and his wife from 1942 to 1951 (Pet. 7),[10] and petitioner had granted Weinstock a power of attorney to represent him with the Bureau of Internal Revenue agents (Ex. 35). During the course of the investigation petitioner had, in addition, specifically referred the investigators to Weinstock for details concerning his financial transactions (R. 184). Weinstock was also the accountant for many, if not all, of the operating ventures in which petitioner had an interest (R. 264-268).

In these circumstances, petitioner's present contention that neither O'Gordon nor Weinstock had authority to bind him by any admissions as to living expenses is completely without merit. As in the case of Exhibits 70 and 71 (*supra*, pp. 14-16), petitioner had designated these men as his representatives for the very purpose of working out such details.

In any event, there is undisputed evidence in the record that petitioner had himself agreed that the first schedule fairly represented his actual living

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to the petitioner, and that petitioner had specifically agreed to that schedule "without equivocation" (R. 273-274. See also Pet. 8-9). That Weinstock had so testified before the grand jury was brought out when the Government impeached him and confronted him with the transcript of his testimony before that grand jury.

[10] That Mr. Weinstock had an intimate knowledge of petitioner's affairs is further shown by petitioner's argument in the court below (C.A. Br. 99) that he could not have had the requisite intent to violate the provisions of the Code because he relied upon Weinstock to prepare his tax returns properly, and for several years he "signed the tax returns in blank and requested Weinstock to complete them." (See R. 286.)

expenses (or, as Mr. O'Gordon put it, he was "happy to use the figures"). This first schedule was less favorable to him than the one finally used,[11] so that he could not have been prejudiced by the introduction and use of the later agreement. Petitioner's objections to the introduction into evidence of either of the two schedules, which he himself had authorized, were properly overruled.[12]

3. Petitioner contends (Pet. 20-21) that the trial court erred in admitting the testimony of the Government's expert accountant, Agent Kleven, and Exhibits 224, 225, 226 and 227.[13] Acknowledging that this ruling was otherwise proper under the decision of this Court in *United States* v. *Johnson*, 319 U.S. 503, petitioner attempts to distinguish that case on the ground that there the conclusions of the expert witness were not in written form. There is, of course, no merit to the suggestion that oral testimony may, but written testimony may not, be taken to the jury room. At best the question whether such testimony should be kept in oral form is for the discretion of the trial court, subject to normal appellate review. Here, petitioner has ob-

[11] The original schedule to which petitioner and O'Gordon agreed contained figures which, for two of the prosecution years, were $3,000 greater than the figures finally used. For the third year, 1945, the first schedule was $1,000 less than the figure finally used, certainly a *de minimis* difference in the light of the total of $23,520 of unreported income for that year (Ex. 226).

[12] Despite petitioner's implications (Pet. 9, 19-20), the record is clear that there never was any understanding that the object of the investigation of petitioner's financial transactions was the institution or compromise of a subsequent civil suit (R. 276-278, 393-398).

[13] See pp. 8-9, *supra*.

tained one appellate review of the exercise of that discretion. There is no need for still another review by this Court.

Nor is there occasion to review the *Johnson* case (Pet. 13, 20-21), which has been consistently followed and applied, not only by the court below, but also by the other courts of appeals.[14] Such expert accountant testimony in complex tax cases gives the jury "needed help."[15] Petitioner, who offered no evidence in his own behalf, was able at the trial to offer only "trivial" objections to the testimony of the Government's expert (C.A. Proc. 13), and could shake neither the foundation nor the conclusions of the witness. He has shown no reason here why that testimony should have been excluded from the jury's consideration.

4. Petitioner's final contention (Pet. 21-23), that the court's charge did not properly instruct the jury, is without merit. Although the court did not grant petitioner's Requested Instruction No. 11 *in haec verba* (R. 582), it did charge the jury that the Government had the burden of proving beyond a reasonable doubt "each and every essential element of the crime" (R. 612), and that the jury was to determine (R. 618):

> whether the individual tax liabilities for the years here involved are correct as the same is

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[14] See, *e.g.*, *Gendelman* v. *United States*, *supra*; *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10); *United States* v. *Augustine*, 189 F. 2d 587 (C.A. 3); *United States* v. *Skidmore*, 123 F. 2d 604 (C.A. 7), certiorari denied, 315 U.S. 800.

[15] *United States* v. *Augustine*, *supra*, p. 590; VII Wigmore, *Evidence* § 1923.

> set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

Those "computations and charts" clearly present the application of the net-worth theory. Further, that theory (which formed the entire basis of the Government's case), and its method of computing income, were made perfectly clear during the trial by Government witnesses and counsel (R. 167, 198, 335-336, 511-515, 585-586), and petitioner does not challenge the validity of the theory as a method of computing taxable income.[16]

Accordingly, the trial court's failure to grant petioner's Requested Instruction No. 11 in its express language could not have prejudiced the petitioner. As the court below, after reviewing the requested instructions and the charge, stated (C.A. Proc. 17):

> * * * the [trial] court most carefully protected the rights of the defendant and * * * as a whole the given instructions were more favorable to the defendant than were the requested instructions. * * *

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[16] Despite petitioner's implications (Pet. 22), the fact that the initial starting point was established as of a date several years prior to the taxable years is not an unusual circumstance in net worth cases. See, *e.g.*, *United States* v. *Potson*, 171 F. 2d 495 (C.A. 7); *United States* v. *Chapman*, 168 F. 2d 997 (C.A. 7), certiorari denied, 335 U.S. 853; cf. *Schuermann* v. *United States*, 174 F. 2d 397 (C.A. 8), certiorari denied, 338 U.S. 831. Nor was there any error in the fact that no net worth was shown for 1937 to 1940 (see Pet. 22). That the Government did not break that period down into annual segments in no way impairs the validity of the later net-worth calculations.

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The alleged deficiency of those instructions in this case, which, in any event, was non-prejudicial, presents no question of importance for this Court to review.

CONCLUSION

The petition for a writ of certiorari, which does not challenge the sufficiency of the evidence to support the conviction, presents no question calling for review. There is no conflict of decisions. Accordingly, it is respectfully submitted that the petition should be denied.

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
MURRAY L. SCHWARTZ,
Special Assistants to the Attorney General.

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